UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

KENN W. THOMAS, Appellant, v. DEPARTMENT OF THE TREASURY, Agency.	)	DOCKET NUMBER AT-1221-96-0406-W-1 DATE: JAN 5, 1998

Peter A. Quinter, Esquire, Fort Lauderdale, Florida, for the appellant.

Scott Falk, Miami, Florida, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

The appellant has petitioned for review of an initial decision, issued June 13, 1996, that dismissed his individual right of action (IRA) appeal for lack of jurisdiction. For the reasons discussed below, we GRANT the appellant's petition under 5 C.F.R. § 1201.115, VACATE the initial decision, and REMAND the appeal for further adjudication in accordance with this Opinion and Order.

BACKGROUND

In an IRA appeal[1] filed on March 8, 1996, the appellant alleged that the agency retaliated against him for whistleblowing in violation of 5 U.S.C. § 2302(b)(8). Specifically, he alleged that his nonselection for the position of Criminal Investigator (Special Agent), resulted from his disclosure of violations of law and of the agency's Merit Promotion Plan. The administrative judge dismissed the appeal for lack of jurisdiction, finding that the appellant had alleged retaliation under 5 U.S.C. § 2302(b)(9), i.e., that the reason for his nonselection was his filing of agency grievances, but that the appellant had not made a nonfrivolous allegation of retaliation for having made whistleblowing disclosures under 5 U.S.C. § 2302(b)(8).

Although the only personnel action at issue in this appeal is the appellant's nonselection for a Criminal Investigator vacancy that was announced on June 1, 1995, which was the subject of both a grievance filed with the agency and a complaint filed with the Office of Special Counsel (OSC), the alleged whistleblowing disclosures relate to a previous agency grievance and OSC complaint. In the first agency grievance, dated October 3, 1994, the appellant alleged that his nonselection for various positions resulted from the agency's failure to comply with the procedures specified in its Merit Promotion Plan and Equal Employment Opportunity Policy.[2] Initial Appeal File (IAF), Tab 9. Later the same month, the appellant filed a complaint with OSC regarding the same

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[1] An IRA appeal is an action authorized by 5 U.S.C. § 1221(a) with respect to personnel actions listed in 5 C.F.R. § 1209.4(a) that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, as in this case, the appellant must seek corrective action from the Special Counsel before appealing to the Board. 5 C.F.R. § 1209.2(b).

nonselections, alleging that the agency had violated 5 U.S.C. §§ 2301(b) and 2302(b) as well as the agency's Merit Promotion Plan and EEO Policy.

On March 22, 1995, OSC terminated its investigation of the appellant's complaint. In April, the appellant requested that OSC reconsider its determination, suggesting that the agency had retaliated against him for "making an issue of these violations." On June 1, 1995, the agency issued Vacancy Announcement #ENF2-005DES for the position of Criminal Investigator (Special Agent). On September 18, 1995, the appellant filed a second agency grievance regarding his nonselection for the June 1 vacancy. Noting his earlier grievance, the appellant stated that:

> As a result of [the first] complaint and the resulting involvement of members of Congress and the Office of Special Counsel, the agency has retaliated against me personally for my lawful disclosure of information that I reasonably believe evidences a violation of law, rule and regulation, i.e., the Merit Promotion Plan and Title 5 USC 2301 and 2302.

The day after filing the second agency grievance, the appellant filed a second complaint with OSC, enclosing a copy of the new grievance and related documents. He stated that he was making "the specific allegation of a violation of Title 5 USC 2302(b)(8) that is retaliation for the legal disclosure of governmental wrongdoing--that is, Whistleblowing." When OSC did not take action within 120 days, the appellant filed the instant appeal. *See* 5 C.F.R. § 1209.5(a)(2).

In dismissing the appeal for lack of jurisdiction, the administrative judge stated that, "Inasmuch as the only activity claim[ed] by the appellant to be whistleblower activity was his grievance activity, I find that the appellant has not engaged in activity protected by the Whistleblower Protection Act."

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[2] Except where otherwise noted, all of the documents cited are located at Tab 6 of the Initial Appeal File.

In his petition for review, the appellant challenges this finding, contending that he made a number of disclosures outside of the grievance process, both to OSC and to members of Congress. In support of the latter assertion, he has attached copies of several letters that he sent to his congressional representatives on October 28, 1994. In its response to the petition for review, the agency urges the Board not to consider these letters because the appellant has made no showing that he could not have produced them in the regional office proceeding. *See* 5 C.F.R. §§ 1201.58, .115(d)(1).

ANALYSIS

Governing Legal Principles

To establish the Board's jurisdiction over an IRA appeal, an appellant must show by a preponderance of the evidence, that: (1) He engaged in whistleblowing activity by making a disclosure protected under 5 U.S.C. § 2302(b)(8), i.e., he disclosed information that he reasonably believed evidenced a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, abuse of authority, or a substantial and specific danger to public health or safety; (2) the agency took or failed to take, or threatened to take or fail to take, a "personnel action" as defined in 5 U.S.C. § 2302(a)(2)(A) after the July 9, 1989 effective date of the Whistleblower Protection Act of 1989 (WPA); and (3) he raised the precise whistleblower reprisal issue before the OSC, and proceedings before the OSC have been exhausted. *See White v. Department of the Air Force*, 63 M.S.P.R. 90, 94 (1994); *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994). That the appellant established the second element is undisputed. Whether he made disclosures protected under 5 U.S.C. § 2302(b)(8), and whether he properly raised the whistleblower reprisal issue before the OSC, are the issues to be decided.

The essential difference between the protections of sections 2302(b)(8) and 2302(b)(9) is the difference between “reprisal based on disclosure of information

and reprisal based upon exercising a right to complain." *Serrao v. Merit Systems Protection Board*, 95 F.3d 1569, 1575 (Fed. Cir. 1996) (quoting *Spruill v. Merit Systems Protection Board*, 978 F.2d 679, 690 (Fed. Cir. 1992)). When disclosures that would otherwise be protected under subsection (b)(8) are made solely in the course of exercising agency grievance rights or the agency's discrimination complaint process, and never presented outside of that context, only subsection (b)(9) is implicated, and an IRA appeal will be dismissed for lack of jurisdiction. *Serrao*, 95 F.3d at 1576; *Fisher v. Department of Defense*, 47 M.S.P.R. 585, 587-88 (1991). If, however, an employee makes one disclosure in an agency grievance proceeding, and one outside that proceeding, "the fact that both disclosures stem from the same set of operative facts is not necessarily inconsistent with the Board's jurisdiction over an IRA appeal." *Serrao*, 95 F.3d at 1576 (quoting *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1035 (Fed. Cir. 1993)).

The appellant made a number of disclosures outside of the agency grievance process.

The administrative judge's finding that the "only activity claim[ed] by the appellant to be whistleblower activity was his grievance activity" is contradicted by several documents in the record. Prior to first raising his nonselection for the June 1 vacancy in September 1995, the appellant wrote three letters to OSC—on October 20 and 24, 1994, and on April 27, 1995—in which he alleged that the agency had violated law and its own policy manuals. Agency reprisal for making disclosures to the Special Counsel is specifically prohibited by both sections 2302(b)(8) and 2302(b)(9). The difference is that, to be covered under subsection (b)(8), the disclosure must be one that the employee reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. Whether the appellant's disclosures were protected under

subsection (b)(8) turns on whether they disclosed "the type of fraud, waste, or abuse that the WPA was intended to reach," *Serrao*, 95 F.3d at 1035, an issue we discuss below. But the fact that the appellant went beyond the agency grievance process by making disclosures to the Special Counsel is clear on the face of the record.

We also find that the appellant made nonfrivolous allegations of disclosures to his congressmen and senators. Although he did not produce copies of his letters to his congressional representatives in the regional office proceeding, the appellant did submit documents indicating that he had made such disclosures. In his October 24, 1994 letter to OSC, he stated that he had agreed to wait until October 28 before contacting his congressional representatives, but that he would forward the relevant documents to them if no solution was found by that date. In an appeal filed with the Board the following month, the appellant stated that he had requested the assistance of his congressional representatives.[3] In his September 12, 1995 letter to OSC, the appellant stated that as "a result of this complaint and the resulting involvement of members of Congress and the Office of Special Counsel," the agency had retaliated against him. Accordingly, although the appellant did not submit documentary evidence of his disclosures to congressmen and senators until he filed his petition for review with the Board, he did make nonfrivolous allegations in the regional office proceeding that he had made such disclosures.[4]

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[3] This appeal was dismissed for lack of jurisdiction on the ground that the appellant had not yet exhausted his administrative remedy with OSC, as required by 5 U.S.C. § 1214(a)(3). IAF, Tab 9.

[4] An appellant who has made nonfrivolous allegations of facts that would establish jurisdiction is entitled to a jurisdictional hearing. *See, e.g.*, *Mitchell v. Department of the Treasury*, 68 M.S.P.R. 504, 512 (1995). Since the appellant made nonfrivolous allegations regarding his disclosures to members of Congress below, he would be entitled to present further evidence of those at a jurisdictional

The appellant's allegations that the agency violated law and its policy manuals are not allegations of the type of fraud, waste, or abuse that the WPA was designed to protect.

At issue in *Ellison v. Merit Systems Protection Board* was whether certain disclosures made to the agency's Inspector General (IG) were protected under section 2302(b)(8) or under section 2302(b)(9). In distinguishing between the two types of disclosures, the court stated:

> The "IG disclosure" might reveal violations of regulations, gross mismanagement, and abuse of authority on the part of the agency in conducting its selection process. *On the other hand, the "grievance disclosure" could challenge the selection process as being unfair and inequitable to the employee because the agency considered nonmerit factors in denying him a promotion opportunity.* Thus, the same operative facts supporting an employment grievance may also give rise to questions of government violations of law or gross mismanagement and waste.
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> However, not every disclosure to the IG pertaining to personnel actions can rise to the level of a section 2302(b) (8) disclosure. An employee does not necessarily make a section 2302 (b) (8) disclosure merely by informing the IG of an adverse personnel action and alleging that it evidences mismanagement or the like. This would convert grievances based on section 2302 (b) (9) into cases appealable to the Board under the WPA, a result Congress clearly did not intend. The facts underlying a section 2302(b)(9) disclosure can serve as the basis for a section 2302 (b) (8) disclosure only if they establish the type of fraud, waste, or abuse that the WPA was intended to reach.

7 F.3d at 1035 (emphasis added, citations deleted). We conclude from the above that a disclosure which alleges only that an agency's selection process was unfair because the agency considered nonmerit factors is not the "type of fraud, waste,

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hearing. We therefore consider the letters submitted on petition for review as properly before us.

or abuse that the WPA was intended to reach," even if made outside of the grievance process.

To a considerable extent, the appellant's disclosures to OSC and members of Congress consisted of allegations that the agency's selection process was unfair and based on nonmerit factors. In his first agency grievance and OSC complaint he alleged, inter alia, that: (1) persons with less experience and qualifications than he were selected; (2) one individual was selected who was not qualified at all; (3) a position was offered to and accepted by an individual who had resigned in lieu of termination; and (4) even though applicants for Special Agent positions had been told that if they did not accept a location offered they would be removed from the eligibility list, two selectees were allowed to accept positions in other offices after declining offers for one location. The appellant alleged that these practices violated the provisions of 5 U.S.C. §§ 2301 and 2302 and various provisions in the agency's Merit Promotion Plan and Equal Employment Opportunity Policy.

Section 2301 provides broadly that "[r]ecruitment should be from qualified individuals" and that "selection and advancement should be determined solely on the basis of relative ability, knowledge, and skills, after fair and open competition which assures that all receive equal opportunity." 5 U.S.C. § 2301(b)(1). Section 2302(b)(6) describes a particular nonmerit-based selection process—where an unauthorized preference or advantage is granted to an employee or applicant for employment for the purpose of improving or injuring the prospects of a particular person for employment.

An allegation that a selection process was unfair because it was based on nonmerit factors would necessarily imply a violation of section 2301. Similarly, an allegation that unauthorized preferences or advantages were extended to some applicants for vacancies, but not to others, might raise a violation of section 2302(b)(6). In making these types of allegations in his letters to OSC and

members of Congress, the appellant thus made nonfrivolous allegations that the agency violated these two statutory sections. In light of the Federal Circuit's guidance in *Ellison*, however, that an individual's challenge to an agency's selection process as "unfair and inequitable to the employee because the agency considered nonmerit factors in denying him a promotion opportunity," is not the "type of fraud, waste, or abuse that the WPA was intended to reach," we conclude that the appellant's allegations of a violation of 5 U.S.C. §§ 2301 and 2302(b)(6) were not whistleblowing disclosures under 5 U.S.C. § 2302(b)(8).[5]

The appellant's disclosures alleging that the agency improperly handled his first grievance, and that the agency discriminated against Marine Enforcement Officers as a class in filling Special Agent positions, constitute disclosures of an abuse of authority within the meaning of 5 U.S.C. § 2302(b)(8).

In *Loyd v. Department of the Treasury*, 69 M.S.P.R. 684 (1996), the Board distinguished between reprisal for filing a grievance and reprisal for disclosing to Congress how the agency handled the grievance. Specifically, the Board found that, in complaining to Congress that the agency had assigned the person named as the subject of the grievance to investigate and decide it, Loyd had made a nonfrivolous allegation of an "abuse of authority" under section 2302(b)(8).[6] *Id.* at 689. In the instant case, the appellant also complained to OSC and members of

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[5] The appellant's allegations that the agency violated its Merit Promotion Plan and Equal Employment Opportunity Policy were very similar in nature to his allegations that it violated 5 U.S.C. §§ 2301-2302. Accordingly, violations of these policies would similarly not be the type of fraud, waste, or abuse that the WPA was intended to reach. We therefore need not determine whether these agency policies were rules or regulations within the meaning of section 2302(b)(8).

[6] The Board has defined an abuse of authority as an arbitrary or capricious exercise of power by a federal official or employee that adversely affects the rights of any person or that results in personal gain or advantage to himself or to preferred other persons. *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 232 (1993).

Congress about the way his grievance was handled, asserting, inter alia, that an Employee Relations official advised his attorneys that the only reason the agency had not settled his grievance was that it feared prosecution by OSC for its violations of merit system principles. He also alleged that the agency assigned the investigation of his grievance to persons accused therein of wrongdoing. We conclude that, as in *Loyd*, the appellant's complaints to OSC and members of Congress about the way his grievance was handled were allegations of an abuse of authority within the meaning of 5 U.S.C. § 2302(b)(8).

In *Mitchell v. Department of the Treasury*, 68 M.S.P.R. 504 (1995), the Board distinguished between whistleblowing disclosures and factually related charges of unfair labor practices (ULP's) made in an agency grievance. In his grievance, Mitchell alleged that management and union representatives colluded to replace seasonal employees with term employees without regard to the seasonal employees' rights under a labor management agreement. *Id.* at 511. Mitchell also appeared on a radio talk show and discussed the operative facts of the alleged ULP's. The Board found that violations actionable under 5 U.S.C. § 7116, the statutory prohibition against ULP's, are more appropriately resolved under the ULP charge procedures, even if revealed through channels intended to reveal a violation of section 2302(b)(8). *Id.* The Board further found, however, that the appellant's allegation of reprisal for revealing, in the radio appearance, the alleged personnel abuses regarding seasonal employees, was an allegation of retaliation for whistleblowing—disclosing an abuse of authority—over which the Board may have IRA jurisdiction, even though the underlying facts were intertwined with the allegations of ULP's. *Id.*

In the instant case, the appellant complained to OSC and members of Congress, as well as to his employing agency, that the agency was improperly discriminating against an entire class of employees—Marine Enforcement

Officers—in its selection process for Special Agent positions. His first complaint to OSC on October 20, 1994, contained the following statement:

> I feel that this is a case of discrimination of an individual, or discrimination of an entire group, based on job description. Since 1989, we (Marine Enforcement Officers), have been told that we were hired into a dead-end job. We as Marine Enforcement Officers are the only job series purposefully excluded from the in-service training agreement which would allow for career advancement. I personally have heard members of upper level SAC Management say; in open forum, that these restrictions were placed on the marine enforcement position with the intention to hinder career advancement. ... I have heard statements made during upper level management meetings that no marine enforcement officers will ever be made Special Agents.

IAF, Tab 6.[7]

Just as the allegation in *Mitchell* that the rights of seasonal employees were being violated was an allegation of an abuse of authority under section 2302(b)(8), the appellant's allegations that Marine Enforcement Officers as a group were being improperly treated constitutes an allegation of an abuse of authority under section 2302(b)(8).

The appellant satisfied the exhaustion requirement of 5 U.S.C. § 1214(a)(3) with respect to his allegations of an abuse of authority.

Before an IRA appellant may file with the Board, he must first seek corrective action from OSC, and wait either until OSC notifies him that it has terminated its investigation, or until 120 days have elapsed. 5 U.S.C. § 1214(a)(3). The first case in which the Federal Circuit considered the exhaustion requirement of section 1214(a)(3) was *Knollenberg v. Merit Systems Protection Board*, 953 F.2d 623 (Fed. Cir. 1992). In ruling that the appellant had not met the exhaustion requirement as to a particular personnel action, the court

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[7] The appellant made identical allegations in the letters he sent his congressional representatives on October 28, 1994. *See* PFR File, Tab 1.

stated that the purpose of the exhaustion requirement is to "give the Office of Special Counsel sufficient basis to pursue an investigation which might have led to corrective action." *Id.* at 626.

The court further explicated the exhaustion requirement in *Ward v. Merit Systems Protection Board*, 981 F.2d 521 (Fed. Cir. 1992). In addition to reiterating the test set out in *Knollenberg*, the court appeared to identify two additional requirements that an IRA appellant must meet to satisfy the exhaustion requirement of section 1214(a)(3): (1) He must inform OSC of the "precise ground of his charge of whistleblowing"; and (2) the "basis for determining the nature of [his] charges of whistleblowing to the Special Counsel are the statements [he] made in his complaint to that official, not his subsequent characterization of those statements in his appeal to the Board." 981 F.2d at 526.[8] The court ruled that, in his IRA appeal to the Board, Ward could not pursue a claim that the agency had retaliated against him for disclosing a gross waste of funds, because gross waste was "not the charge of whistleblowing that Dr. Ward made to the Special Counsel: he asserted only 'gross mismanagement,' which, as we have held, his allegations did not show." *Id.*

Ward could be interpreted as creating a "correct labeling" requirement, i.e., if an OSC complainant alleges that he disclosed information which he reasonably believed evidences whistleblowing within the meaning of 5 U.S.C. § 2302(b)(8), but incorrectly identifies which section (b)(8) category of wrongdoing is involved, then his IRA appeal to the Board must be dismissed for lack of jurisdiction, regardless of whether the facts alleged evidence a different section (b)(8) category

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[8] In *Ellison v. Merit Systems Protection Board*, 7 F.3d 1031, 1036 (Fed. Cir. 1993), the court emphasized the need for an IRA appellant "to articulate with reasonable clarity and precision the basis for his request for corrective action under the WPA." *See also Serrao v. Merit Systems Protection Board*, 95 F.3d

of wrongdoing. If *Ward* is interpreted in this way, then this appeal would have to be dismissed because, in his second OSC complaint, the appellant unequivocally characterized his disclosures as evidencing a violation of law, rule, or regulation, not an abuse of authority. *See supra* at 3.

We conclude that construing *Ward* to include a correct labeling requirement would be inconsistent with the overarching purpose of the exhaustion requirement—to give OSC a sufficient basis to pursue an investigation which might lead to corrective action. If an IRA appellant has set forth factual allegations in his OSC complaint which, if proven, would establish an abuse of authority, but he mistakenly labels the allegations as a violation of law, rule, or regulation, we believe that he has nonetheless given OSC a sufficient basis to pursue an investigation which might lead to corrective action.[9] As the agency responsible for investigating and prosecuting cases involving retaliation for whistleblowing disclosures under the WPA, OSC can be expected to know what section (b)(8) category[ies] of wrongdoing might be implicated by a particular set of factual allegations. The mere fact that a complainant has invoked the wrong (b)(8) label should therefore not prevent OSC from taking appropriate investigatory and corrective action. Requiring an appellant to correctly label his claim of whistleblowing is the sort of artificial distinction or technicality that led

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1569, 1577 (Fed. Cir. 1996); *Mintzmyer v. Department of the Interior*, 84 F.3d 419, 422 (Fed. Cir. 1996)

[9] To the extent that previous Board decisions have held or implied that the exhaustion requirement of 5 U.S.C. § 1214(a)(3) entails a "correct labeling" requirement, they are hereby overruled. *See, e.g., Carolyn v. Department of the Interior*, 63 M.S.P.R. 684, 690, *review dismissed*, 43 F.3d 1485 (Fed. Cir. 1994) (Table); *Ayala v. Department of Justice*, 61 M.S.P.R. 515, 518 (1994); *D'Elia v. Department of the Treasury*, 60 M.S.P.R. 226, 231 (1993); *Von Kelsch v. Department of Labor*, 59 M.S.P.R. 503, 511 (1993), *review dismissed*, No. 94-3109 (Fed. Cir. 1994).

to the enactment of the WPA of 1989. *See* S. Rep. No. 413, 100th Cong., 2d Sess. 13 (1988).[10]

Just as statutory sections relating to the same subject should be interpreted so as to be consistent with one another,[11] and so that no statutory language is rendered inoperative or superfluous,[12] the court's statements about the exhaustion requirement should be interpreted so as to be consistent with another, and so that

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[10] The Senate Report contains the following language:

> In *Fiorello v. Department of Justice* (795 F.2d 1544, 1550 Fed. Cir. 1986) an employee's disclosures were not considered protected because the employee's "primary motivation" was not for the public good, but rather for the personal motives of the employee. The court reached this conclusion despite the lack of any indication in CSRA that an employee's motives are supposed to be considered in determining whether a disclosure is protected. The Committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing.

Id. In his dissent in *Costin v. Department of Health & Human Services*, 64 M.S.P.R. 517, 533-34, *review dismissed*, 42 F.3d 1409 (Fed. Cir. 1994) (Table), Chairman Erdreich similarly complained that the Board, by insisting on an unreasonably high level of specificity in the allegations presented to OSC, "effectively places an obstacle in the path of those who seek relief from reprisal for revealing wrongdoing by government officials ...." *See also Brown v. Department of the Navy*, 66 M.S.P.R. 355, 357-58 (short-form Order, Chairman Erdreich, dissenting) (citing remarks by Congressman McClosky critical of the Board's decision in *Costin*), *aff'd*, 64 F.3d 675 (Fed. Cir. 1995) (Table).

[11] *See Loui v. Merit Systems Protection Board*, 25 F.3d 1011, 1013 (Fed. Cir. 1994).

no part of the opinion is rendered inoperative or superfluous. Interpreting *Ward* to include a correct labeling requirement would be inconsistent with, and render inoperative, the court's statements in *Knollenberg*, *Ward*, and subsequent decisions that the purpose of the exhaustion requirement is to give OSC a sufficient basis to pursue an investigation which might lead to corrective action.

The only way to read the "precise ground" and "subsequent characterization" language so as to be consistent with the court's statements about the purpose of the exhaustion requirement is to treat correct labeling as one factor to be considered in determining whether an appellant has provided OSC with a sufficient basis to pursue an investigation that may lead to corrective action. Viewed in this light, the reason that Ward's complaint to OSC was insufficient to give the Special Counsel a basis to investigate whether his agency retaliated against him for disclosing gross waste was not simply that he labeled it as gross mismanagement, but that the facts he alleged were more consistent with gross mismanagement than with gross waste. In particular, Ward failed to tell the Special Counsel, as he later did tell the Board (his "subsequent characterization"), that, but for his disclosure, the agency would have wasted hundreds of thousands of dollars.[13]

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[12] *See Forest v. Merit Systems Protection Board*, 47 F.3d 409, 412 (Fed. Cir. 1995); *Little v. U.S. Postal Service*, 66 M.S.P.R. 574, 582 (1995).

[13] In his OSC complaint, Ward claimed that a scientist from another agency gave his (Ward's) superior an erroneous understanding of a research project that Ward was working on, with the effect that the superior was on the verge of canceling the project until Ward corrected the misunderstanding caused by the outside scientist. 981 F.2d at 524. In his appeal to the Board, Ward further explained that he "prevented a gross waste of funds, several hundred thousand dollars, which would have been spent for naught because of the erroneous information [the outside scientist] provided [the superior]," which would have resulted if the superior, in reliance on the erroneous advice, had canceled the project. *Id.* at 525-26.

Applying these principles to the instant case, we think that the appellant did supply OSC with sufficient information to enable the Special Counsel to conduct an investigation to determine whether the agency retaliated against him for disclosing an abuse of authority, even though he referred to his factual allegations as evidencing a violation of law, rule, or regulation. It would be unreasonable to expect a pro se complainant to understand that the correct section (b)(8) category for complaining about the way an agency has handled a grievance, and specifically that the agency assigned a person named as the subject of the grievance to investigate and decide the grievance, is an abuse of authority. *See Loyd*, 69 M.S.P.R. at 689. It is also unreasonable to expect such an individual to understand that abuse of authority is also the correct category for an allegation that the agency discriminated against an entire class of employees in its selection process.[14] *See Mitchell*, 68 M.S.P.R. at 511. Yet the appellant made both of these specific factual allegations against the agency in his complaint to OSC. We think he thereby gave OSC sufficient information on which to investigate whether the agency retaliated against him for disclosing an abuse of authority, and satisfied the exhaustion requirement of 5 U.S.C. § 1214(a)(3).

ORDER

Accordingly, we REMAND this case to the Atlanta Regional Office for further adjudication. The only jurisdictional element which has yet to be established is the reasonableness of the appellant's belief as to the factual allegations that we have found would constitute abuses of authority. *See Loyd*, 69 M.S.P.R. at 690. On remand, the administrative judge shall afford the appellant a hearing in which he will have an opportunity to prove this element. If the

[14] The appellant's error in this regard is particularly understandable because, as discussed above, this type of allegation can reasonably be viewed as a violation of 5 U.S.C. §§ 2301(b)(1) and 2302(b)(6).

administrative judge finds jurisdiction, she must address the merits of the appellant's IRA appeal.

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.